

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

3 | PEGGY JONES,

Plaintiff,

5 | v.

6 LARRY JEGLEY, Prosecuting
7 Attorney for Pulaski County,
8 In His Official Capacity;
9 SYBAL JORDAN HAMPTON, In Her
Official Capacity as a Member
of the Arkansas Ethics
Commission; TONY JUNEAU, In
His Official Capacity as a
Member of the Arkansas Ethics
Commission; ASHLEY DRIVER
YOUNGER, In Her Official
Capacity as a member of the
Arkansas Ethics Commission;
ALICE L. EASTWOOD, In Her
Official Capacity as a Member
of the Arkansas Ethics
Commission; LORI KLEIN, In
Her Official Capacity as a
Member of the Arkansas Ethics
Commission.

No. 4:19CV00234 JM

Wednesday, June 12, 2019
Little Rock, Arkansas
1:40 p.m.

Defendants.

**TRANSCRIPT OF HEARING ON MOTION FOR PRELIMINARY INJUNCTION
BEFORE THE HONORABLE JAMES M. MOODY JR.,
UNITED STATES DISTRICT JUDGE**

APPEARANCES:

On Behalf of the Plaintiff:

22 MR. CHAD W. PEKRON, Attorney at Law
MR. THOMAS CHRISTOPH KELLER, Attorney at Law
MS. BRITTANY S. FORD, Attorney at Law
23 Quattlebaum, Grooms & Tull PLLC
111 Center Street, Suite 1900
24 Little Rock, Arkansas 72201-3325

[CONTINUED]

1

2 APPEARANCES CONTINUED:

3

4 On Behalf of the Defendants:

5

6 MR. DANIEL L. MCFADDEN, Assistant Attorney General
MS. RENAE FORD HUDSON, Assistant Attorney General
7 Arkansas Attorney General's Office
323 Center Street, Suite 200
Little Rock, Arkansas 72201-2610

8

9

10

11

12

13

14

15 Proceedings reported by machine stenography and displayed
16 in realtime; transcript prepared utilizing computer-aided
transcription.

17

18

19

20

21

22

23

24

25

1 | (Proceeding at 1:40 p.m., as follows:)

2 THE COURT: We're on the record in Jones v. Jegley,
3 Case No. 4:19CV234. For the plaintiff I have Chad Pekron,
4 Brittany Ford, and Chris Keller. Did I get that right?

5 MR. PEKRON: Yes, your Honor.

6 THE COURT: Where's Tull?

7 MR. PEKRON: Tull is in Hot Springs.

8 THE COURT: Okay. Sorry to bring y'all back. I
9 didn't think about that. I guess I should have. Egocentric
10 personality.

11 And then Daniel McFadden here for the defendants.

12 MR. MCFADDEN: That is correct, your Honor.

13 THE COURT: All right. So we are here on a motion for
14 a preliminary injunction. Plaintiffs claim that Arkansas Code
15 Annotated 7-6-203, which imposes a complete ban on candidates
16 for state office accepting or soliciting contributions more than
17 two years before an election, they claim it's unconstitutional
18 for two reasons, which are set forth in the briefs.

19 And I'm just going to say the government -- collectively, I
20 guess, rather than any one individual.

21 MR. MCFADDEN: That's correct, your Honor.

THE COURT: -- claims not so, essentially.

23 I have gone through most, if not all, of the pleadings in
24 the matter, including Document 13, 14, 19, 20, and -- well, and
25 12 to begin with, as well as quite a bit of case law. And so

1 with the benefit of knowing what I've read, I'll turn it over to
2 y'all for y'all's presentation.

3 Mr. Pekron?

4 MR. PEKRON: Thank you, your Honor. I'll try to be
5 brief today because I think the parties have explained this
6 issue in great detail in the briefs, but I'm certainly available
7 to answer whatever questions the Court might have.

8 I'd like to say first, your Honor, that I think this is a
9 very straightforward case, at least in terms of the facts at
10 issue. Plaintiff Peggy Jones submitted an affidavit stating
11 that she wants to give financial contributions to candidates
12 running for elected office in Arkansas in the 2022 elections.
13 That affidavit stands uncontradicted, that this is, in fact, her
14 intent.

15 It is also undisputed that the blackout period imposed by
16 Arkansas Code Section 7-6-203(e) prohibits such contributions.

17 THE COURT: Well, it prohibits the acceptance of such
18 contributions; it doesn't prohibit Ms. Jones from making one, as
19 I read it.

20 MR. PEKRON: A contribution can't be offered unless
21 someone is there to accept it. And so the chill on speech is a
22 chill on Ms. Jones's speech because it punishes the recipients
23 of that speech. So your Honor is correct that that is how the
24 statute is read, but the chilling effect on Ms. Jones as a
25 result of the chill that's imposed on the listeners, the threat

1 of criminal action against the listeners, the recipients of her
2 speech, is enough to give her standing to bring this case. She
3 is entitled, especially in a circumstance like this where the
4 speech is unpopular and there are good reasons why the
5 recipients may not want to come and challenge it themselves.
6 Nobody wants to be the candidate that's out there saying, I want
7 longer campaign cycles. I want --

8 THE COURT: Well, who is she going to donate to?

9 MR. PEKRON: Your Honor, she doesn't have that in the
10 affidavit. I don't think it's required to disclose the specific
11 candidates she wants to contribute to in order to have standing
12 to sue here. Obviously, if your Honor believes that's a
13 necessary factor to have standing, we would supplement the
14 record with that information, but I don't believe she's --

15 THE COURT: I think she has to tell me more than she
16 just wants to make some contributions. She has to have some
17 particular speech that she wants to make, and so --

18 MR. PEKRON: And she has said what her speech is. She
19 wants to make it in the form of a contribution to a candidate
20 that's running in 2022. I think if you go back to the --

21 THE COURT: Well, I mean, are you going to answer my
22 question or not?

23 MR. PEKRON: Your Honor, I actually don't know the
24 answer to exactly who she wants to contribute to. She has told
25 me that she has people in mind that she believes are going to

1 run in 2022. They haven't announced for the reason that they
2 can't raise any money. They can't even go get a sign to hang up
3 and say, I'm running in 2022 because they can't raise any money
4 to pay for it. So basically what the State is doing here --

5 THE COURT: Well, they can announce without money to
6 pay for it, Mr. Pekron. I mean, you're not saying that this --
7 whoever this person is can't announce that they're interested in
8 running in 2022 because they don't have any money to tell
9 anybody. I mean, they --

10 MR. PEKRON: Well, your Honor -- I'm sorry.

11 THE COURT: Any newspaper person on any corner is
12 probably going to be happy to listen to them say, I'm thinking
13 about running for some office in 2022, and they don't have to
14 pay the newspaper person to print that.

15 MR. PEKRON: Your Honor, that's possible.

16 THE COURT: So right now all I have is her affidavit
17 that I'd like to give to a political hopeful, somebody
18 considering it, perhaps, and I'm going to need something more
19 than that, something more concrete, than I might want to give to
20 somebody running in 2022, whoever that might be, whether they've
21 announced or not or even decided to run or not.

22 So I guess what I'm telling you is, it's awfully
23 speculative right now whether or not she is going to make any
24 contribution to anybody in particular right now.

25 MR. PEKRON: Well, your Honor, if you believe that

1 that's a predicate that we need to meet, we're certainly happy
2 to submit a supplemental affidavit with names of people she
3 intends to contribute to. I don't think as a matter of law she
4 is required to say exactly who she wants to give to, and, in
5 fact, if you go back to the Eighth Circuit's opinion in the
6 *Butler* case, which Judge Arnold wrote, the Eighth Circuit did
7 not require the plaintiffs that were challenging other
8 provisions in this same 1996 act to identify the candidates they
9 wanted to support with their contributions. All the plaintiff
10 argued in that case, all the plaintiff alleged is, there's a
11 limit here that says I can't give over a hundred dollars to this
12 group of candidates and give over \$300 to this group of
13 candidates. I want to give contributions in excess of those
14 amounts to people running for those offices. And the Eighth
15 Circuit held that that was sufficient, to give her Article III
16 standing. And that's exactly where we are here.

17 As long as she says she wants to do the kind of speech
18 that's prohibited, that's all that's required for standing under
19 Article III. And, in fact, I think it would cause a chilling
20 effect for her to have to say who she wants to contribute to
21 because then she's putting forth her private political decisions
22 in order to vindicate her First Amendment rights.

23 In Arkansas, for example, if she wants to give less than
24 \$50 to a candidate, that doesn't even have to be disclosed.
25 That could be done anonymously.

1 THE COURT: She hasn't said that she's going to make a
2 contribution under the disclosure limit. I mean, she hasn't put
3 forth anything -- I mean, there's case law out there that says
4 you can't just say, I want to do something, without any concrete
5 backing on it, that the notion that I might want to do this or
6 that I might want to do that, but -- that's not sufficient. I
7 guess I've all but told you what I'm going to need, and we can
8 argue about whether or not you'll provide it, and either you
9 will or you won't. I mean, that's simple enough.

10 MR. PEKRON: Well, your Honor, all I'll say, first of
11 all, is that I respectfully disagree with you. I believe *Butler*
12 has made clear that you don't need to require -- you don't need
13 to provide that sort of evidence.

14 The cases the State provides where there's nothing concrete
15 is where there wasn't a concrete intention to actually do an act
16 prohibited by the statute. For example, in the *Zanders* case,
17 the statute at issue says you couldn't make -- it prohibited
18 making a knowingly false report of police misconduct. And the
19 plaintiffs there said, we want to make reports of police
20 misconduct. We intend to make true reports of police
21 misconduct. So the Eighth Circuit said -- well, backing up,
22 they said, but we're worried that somebody will believe that our
23 true report of police misconduct is a false one and we could be
24 prosecuted.

25 And the Eighth Circuit said, okay, you haven't said you

1 want to violate the statute. In fact, you've said you don't
2 want to violate the statute, and so you don't have standing.

3 Here, Ms. Jones said precisely, I want to engage in conduct
4 that is prohibited by this statute. That's all that the Eighth
5 Circuit has ever required for standing, and I think *Butler* is
6 directly on point with that.

7 As I've said, your Honor, if the Court believes that that
8 information is required, we ask that rather than dismiss the
9 motion, you leave open the report for a short period of time for
10 us to provide that information. I think it would be most
11 efficient, in any event, to argue everything today while we're
12 all here, both as to the other matters of standing and on the
13 merits.

14 THE COURT: No, I'm going to let you argue everything
15 you're here for today and then just let you supplement that, and
16 I'll keep the record open for that.

17 MR. PEKRON: Okay. That's what we'll do.

18 The other parts of standing beyond what we've already
19 discussed are, the plaintiffs have argued -- well, before we
20 even get to that, I want to put the blackout period in context.
21 The blackout period that was imposed by 7-6-203(e) prohibits
22 contributions made more than two years before an election. That
23 blackout period is one of seven campaign finance reforms created
24 by Initiated Act 1 in 1996. The other six reforms were all
25 immediately challenged and held to be unconstitutional. Three

1 were held unconstitutional in an Eighth Circuit opinion that
2 Judge Arnold authored in *Russell v. Burris*. The other three
3 were held unconstitutional by Judge Waters in *Arkansas Right to*
4 *Life State PAC v. Butler*. One of the three invalidated by Judge
5 Waters was a blackout period in contributions made during a
6 session of the General Assembly.

7 THE COURT: Is that the 30 days before, 30 after, and
8 then all during?

9 MR. PEKRON: Yes, your Honor. 30 days before, after,
10 and during.

11 Judge Waters said absent any evidence that demonstrated a
12 greater risk of corruption during that particular period of
13 time, the restriction on speech caused by the blackout period
14 was unconstitutional. Here, there's similarly no evidence of
15 corruption made by contributions more than two years before an
16 election that's greater than corruption at any other time
17 period.

18 THE COURT: Mr. Pekron, can you slow down a little
19 bit?

20 MR. PEKRON: I'm sorry.

21 THE COURT: No worries.

22 MR. PEKRON: Because there's no similar evidence of
23 corruption here, the blackout period similarly should be
24 invalidated.

25 Your Honor, we're here today and plaintiffs request that

1 this Court preliminarily enjoin the blackout period during the
2 pendency of this case. The parties do not disagree that in a
3 First Amendment case, the only relevant consideration for
4 injunctive relief is whether the plaintiff has demonstrated a
5 likelihood of success on the merits. And that makes sense
6 because the Eighth Circuit and other courts have generally
7 assumed that when the First Amendment rights are being abridged,
8 the other factors that are normally applicable to injunctive
9 relief at the preliminary stage, such as irreparable harm and
10 the public interest, are expected to be met as a matter of law.
11 And, as we'll get to shortly, plaintiff has demonstrated a very
12 strong likelihood of success on the merits. And, in fact,
13 that's seen by the fact that the State's response brief devotes
14 most of itself to standing and other issues as to why this Court
15 should never reach the merits.

16 I think we've already pretty well discussed the first point
17 I was going to make on standing, but I want to go beyond the
18 issue of whether she has to provide specific names, because the
19 State has also alleged that even if she provides a specific
20 name, that may not be enough, because according to the State,
21 she should first violate the statute and then see if anybody is
22 prosecuted because of it.

23 But the Eighth Circuit precedent, including Judge Arnold's
24 decision in *Butler*, made clear that all that's required to
25 create Article III standing is a specific intent to pursue

1 conduct in violation of the challenged statute. That's exactly
2 what plaintiff has done here. She said she wants to make
3 contributions more than two years before the election. The
4 blackout period prohibits that type of contribution. And that's
5 all that's required for standing.

6 Your Honor, the State's response to this is to allege that
7 plaintiff hasn't made a credible fear of prosecution for anyone
8 until and unless the statute is violated. But with all due
9 respect, that's exactly the opposite of what the Eighth
10 Circuit's law of standing in the First Amendment context
11 requires. Cases like *Butler* and *281 Care* make clear that you
12 don't have to wait until a prosecution arises in order to
13 challenge a statute in federal court.

14 Nobody's required to make the choice that the State
15 suggests here, that someone should violate the First -- should
16 violate the statute and then see if prosecutorial discretion
17 will keep anyone from being prosecuted under it.

18 Again, I'd just mention that to the extent the State relies
19 upon cases showing that there's not a credible fear of
20 prosecution, those are cases where the conduct at issue may or
21 may not violate the statute, depending on how somebody else
22 looks at it later. In fact, those cases, like the *Zanders* case,
23 plaintiff says we don't want to violate the statute, we don't
24 want to make a false police report, but we're afraid the State
25 is going to interpret our report as a false report, and

1 therefore we're chilled. That's not this case. There's no
2 question that contributions made more than two years before an
3 election violate Arkansas law.

4 The State has also contended that the plaintiff doesn't
5 have Article III standing because she is currently refraining
6 from violating the blackout period. But, your Honor, the Eighth
7 Circuit has been clear that self-censorship is by and of itself
8 enough injury in fact to create Article III standing. Again,
9 that's what *Butler* held.

10 Turning briefly to the other two arguments the State makes
11 as to why this Court shouldn't hear the merits, first is the
12 alleged sovereign immunity with respect to the Ethics Commission
13 defendants. But the State admits that they are proper
14 defendants in this case if they have something to do with the
15 enforcement of the act in question. And here it's undisputed
16 that the Ethics Commission can impose fines against candidates
17 that are recipients of the plaintiff's contributions. Although
18 the commission can't act against the plaintiff directly, they
19 can still chill her speech by punishing the recipients.

20 Plaintiff is therefore entitled to ask that the commission
21 be barred from creating that chill upon the recipients of her
22 speech. She doesn't seek money damages against them. *Ex Parte*
23 *Young* prevents an injunction to prevent them from engaging in
24 unconstitutional activities. Sovereign immunity doesn't apply.
25 Nor should this Court abstain in favor of a state court

1 determination.

2 The State alleges, the State argues that this Court should
3 abstain in favor of some determination of the blackout period in
4 the future, presumably following a prosecution in state court.
5 But we're not aware of any case in which a state court has
6 abstained in a matter involving federal constitutional rights in
7 deference to a state determination of those rights.

8 The defendant cites the general rule that a federal court
9 should not hold --

10 THE COURT: Mr. Pekron, I'm going to make sure I heard
11 you correctly.

12 (Reviewing realtime screen.)

13 The way I heard you and it was transcribed is that you're
14 not aware of any case in which a state court has abstained in a
15 matter involving federal constitutional rights.

16 MR. PEKRON: I misspoke. It should be a federal court
17 has not abstained in a case involving federal rights.

18 THE COURT: I thought that's what you meant, but I
19 wanted to make sure that that was what you were saying.

20 MR. PEKRON: Thank you, your Honor. I appreciate you
21 allowing me to clarify the record on that point.

22 The State here relies upon the general rule that a statute
23 should not be declared unconstitutional if it's subject to a
24 narrowing construction, construction that would save its
25 constitutionality. But that's not even the doctrine of

1 abstention. That's just the doctrine of constitutional
2 avoidance. In any event, the State hasn't suggested what that
3 narrowing construction might be.

4 The statute is clear. It says no contributions more than
5 two years before an election. We can't envision what a
6 narrowing construction of that would be.

7 In any event, if the State was correct, Judge Arnold should
8 have abstained in the *Russell* case and Judge Waters should have
9 abstained in *Butler*. Those were the two cases that invalidated
10 the other six provisions of the 1996 act. We would respectfully
11 suggest that those judges did not err, and this Court should
12 proceed with vindicating plaintiff's constitutional rights.

13 Now we're going to turn to the merits. Plaintiff has
14 demonstrated a strong likelihood of success here. The State's
15 argument on the merits is simple. They just say we don't like
16 corruption, and because of that we can impose whatever
17 restriction on speech we think is necessary to reduce
18 corruption. With all respect, that's just not how it works.
19 Because the State hasn't presented any evidence that would
20 satisfy the high evidentiary bar that is required in order to
21 burden plaintiff's speech here, plaintiff has shown a likelihood
22 of success on the merits.

23 First of all, your Honor, there's no question that the
24 campaign contributions that plaintiff wants to make are
25 protected speech. Even *Buckley v. Valeo* recognized that a

1 desire to make campaign contributions is a protected First
2 Amendment activity. The Court said in that case a contribution
3 serves as a general expression of support for the candidate and
4 his views.

5 Because the government wants to restrict that speech, cases
6 like *United States v. Playboy* have made clear that the State has
7 the burden of proving the constitutionality of the restriction.

8 Your Honor, the Supreme Court in *McCutcheon* made clear what
9 that means. Restriction on political speech can only be upheld
10 if the State demonstrates a sufficiently important interest and
11 employs means closely drawn to avoid unnecessary abridgement of
12 associational freedoms.

13 In other words, a law must fit the objective without
14 unnecessarily restricting speech.

15 The Supreme Court has repeatedly emphasized, most recently
16 in *McCutcheon*, the only interest that's legitimate for
17 restricting campaign contributions is to combat, quote, quid pro
18 quo corruption or its appearance; in other words, the direct
19 exchange of an official act for money. Very narrow interest.

20 It's not enough just to say that there's an interest in
21 preventing corruption. The State has to come forward with some
22 evidence to support the particular restriction at issue.

23 *Citizens United* dealt with this general corruption idea and said
24 you can't just say corruption, because if that's enough, that
25 would justify anything that would possibly restrict speech.

1 That's exactly what the State would have this Court do here.
2 They've said, well, we're worried about corruption; therefore,
3 the blackout period is valid. The Supreme Court requires more.
4 The First Amendment requires more.

5 The State has come forward with no evidence at all to link
6 contributions made more than two years before an election with
7 an appearance of corruption beyond that which comes from
8 contributions made less than two years before an election. The
9 only thing the State even mentions in its brief -- and it's not
10 evidence. It's just something it mentions. It's we all know
11 there's corruption at the General Assembly. But the State
12 doesn't even try to argue, much less provide evidence that that
13 corruption has anything to do with the timing of the
14 contributions. In fact, what we've all seen, the problem with
15 corruption comes because people are taking money way over and
16 beyond \$2,700, which is the limit for contribution limits in
17 Arkansas.

18 That runs right into the problem that *McCutcheon* recognizes
19 and that the Fifth Circuit recognized in *Zimmerman* when it
20 similarly struck down blackout periods, which is that because
21 Arkansas already has a maximum on contributions -- you can give
22 \$2,700 in the primary, \$2,700 in the general, that's it.
23 Because there's maximum limits on contributions, any additional
24 restrictions on campaign contributions have to be supported by
25 evidence which would show that this restriction serves a

1 distinct interest not addressed by the base limit.

2 In other words, the State has to show how the blackout
3 period itself fights contribution -- or fights corruption, I'm
4 sorry, in a way that's not already addressed by the \$2,700
5 contribution limit.

6 In other words, the State has to answer this question: How
7 is a \$2,700 contribution or even a \$27 contribution made more
8 than two years before the election more corruptive than a \$2,700
9 or even a \$27 contribution made less than two years before the
10 election? The State doesn't even try to answer that question.

11 So, as a result, the plaintiff suggests that this Court
12 should follow the same analysis used by the Fifth Circuit in the
13 recent case in *Zimmerman* and by Judge Waters in the *Butler* case.
14 Both cases recognize that absent any evidence that the timing of
15 a contribution affects the appearance of corruption, the
16 government could not demonstrate that the maximum limit on
17 contributions was not sufficient to prevent corruption.

18 Both courts acknowledge the obvious, which is that
19 corruption can take place at any time, and so there has to be
20 some evidence that the particular times subject to the blackout
21 period are particularly prone to corruption. The State doesn't
22 provide that evidence here.

23 Moreover, as Judge Waters noted, blackout periods are
24 necessarily overbroad because they bar all contributions
25 regardless of size. He cites Judge Arnold's opinion in *Russe11*

1 for the proposition -- it's not just a proposition. It's
2 well-recognized that only large contributions pose a threat of
3 corruption. And as Judge Waters recognized, because the
4 blackout period prohibits all contributions, large, small, or
5 otherwise, it's necessarily overbroad and not closely drawn to a
6 governmental interest. This blackout period suffers from all
7 those same infirmities and therefore should likely be held
8 unconstitutional.

9 Your Honor, in closing, we recognize that the blackout
10 period was probably enacted because people don't like long
11 campaigns, probably think two years is long enough. But
12 disliking particular types of speech is no reason to bar it,
13 particularly when the speech at issue is core political speech
14 like these contributions. In fact, it's unpopular speech that's
15 the most important reason why we have the First Amendment.

16 Here, the State has not shown any evidence supporting the
17 only valid reason that the Supreme Court has given to limit
18 plaintiff's speech, which is an interest in fighting quid pro
19 quo corruption. Because plaintiff is likely to prevail on the
20 merits, we would ask this Court to give her a preliminary
21 injunction barring enforcement of the blackout period during the
22 pendency of this case.

23 THE COURT: Thank you, Mr. Pekron.

24 MR. PEKRON: Thank you, your Honor.

25 MR. MCFADDEN: Your Honor, may I approach?

1 THE COURT: You may, Mr. McFadden.

2 MR. MCFADDEN: Your Honor, in addition to the
3 preceding arguments that the State has made through their
4 response to plaintiff's request for the preliminary injunction,
5 I have to say I took a chance to take a look at the statute
6 again this morning, and maybe just fresh eyes give you a
7 different perspective. But judging that in conjunction with
8 what the plaintiff has stated in her affidavit for this motion,
9 or for this hearing, rather, I think there's a good case to make
10 that, frankly, she can do as she claims she can do right now.
11 And what I mean by that is that 7-6-203(e) has been challenged,
12 which states in the first sentence at the very end: At which
13 the candidate seeks nomination or election.

14 That's assuming the candidate has sought the election or
15 announced themselves.

16 Here, in her affidavit, there is no mention or reference
17 whatsoever as to anyone actually announcing. Rather, she states
18 that she wants to encourage people to run for office. So taking
19 that into consideration, in addition to our previous arguments,
20 I don't know what is stopping her right now other than herself.

21 Additionally and equally important, just going on an
22 assumption that there may be a candidate out there for whatever
23 form of office who may be an incumbent shall also have the
24 opportunity to donate to a previous campaign debt.

25 THE COURT: Well, I want to set standing aside for a

1 moment because we're going to wade through that in a moment, but
2 let's assume that it's two and a half years before an election,
3 that somebody has stood on a mountaintop and screamed: I want
4 to run for Governor. Didn't necessarily have any money to do
5 that, but said it. Somebody heard him and printed it. And so
6 now it's out there that he has maybe not filed, but has shown an
7 interest in running. And let's assume for a minute Ms. Jones
8 likes his message and wants to contribute to him. What is it
9 about a two-year period that makes him less likely to feel
10 bribed because of that contribution?

11 And I guess a better question was, what would keep him from
12 feeling just as obligated to Ms. Jones had he taken it within
13 the two-year period? Maggio took a contribution well within the
14 two years. It was within 180 days from the election. And that
15 didn't prevent him from getting into his mess. How is
16 Ms. Jones's contribution, assuming that we have standing just
17 for the sake of argument, going to somehow corrupt or not
18 corrupt, depending on the timing of the contribution, this
19 imaginary candidate?

20 MR. MCFADDEN: Well, your Honor --

21 THE COURT: And that's the question that they've asked
22 you to answer, and I know you say, I don't want to answer that
23 because I don't think she has standing. And I'm not saying
24 you're saying that, but humor me for a moment and let's assume
25 that there's standing, because I clearly think that Mr. Pekron

1 is right that you don't have to violate the statute to have
2 standing. I do believe you have to show something more than a
3 passing interest in being involved in the process, and so I am
4 going to request that he provide me something that gets her past
5 the front door of the standing, but I'm not going to make her go
6 out there and try to contribute to somebody that might either
7 get them prosecuted or her herself. I'm not sure that she can
8 be prosecuted under this statute. But I do feel that the fact
9 that somebody can as a result of that action is sufficient to
10 make the leap from this is all about candidates, not about
11 donors. But I've searched my mind for some reason why or some
12 evidence in the record of an indication that two years is really
13 a meaningful period of time for which you can delineate likely
14 quid --

15 Say that for me, Mr. Pekron. I need a glass of water.

16 MR. PEKRON: I had to practice that for the last four
17 days to not screw it up, so I'll probably screw it up. Quid pro
18 quo.

19 THE COURT: Quid pro quo. And after some water, I can
20 say it, actually.

21 MR. MCFADDEN: You can say tit for tat, too, if that
22 works, your Honor.

23 THE COURT: I'm sorry?

24 MR. MCFADDEN: You can say tit for tat, too.

25 THE COURT: Indeed. But do you have anything -- is

1 there any legislative intent? Is there any hearings before the
2 legislature that put anything -- I haven't seen a lick of
3 evidence other than the notion that people want to hear from us
4 more than two years before an election, and they're right. But
5 I'm not sure that's sufficient.

6 And so that's my threshold issue is, we've seen a lot of
7 corruption lately. Not any of it has been a result of campaign
8 contributions that have been made in excess of two years. And
9 I'm not sure that that's a self-fulfilling evidentiary burden
10 that people have been getting thrown in jail a lot lately who
11 have been hanging around the legislature, and make the
12 connection that they've somehow done that because of early
13 contributions.

14 And I think you've got a tough position to champion today
15 because I'm not sure you've been given any rocks to throw. And
16 I'm not criticizing you for that because I'm sure you looked in
17 the box and there wasn't much to throw, but --

18 MR. MCFADDEN: We're working with what we've got, your
19 Honor.

20 THE COURT: Right. I understand that, and I'm not
21 being critical of you or the government's position at all, other
22 than the fact that your likelihood of success on the merits or
23 the plaintiff's has in large part to do with you convincing me
24 that you've got something that we'll talk about sometime down
25 the road. Because I'm not aware of it and it hasn't been put in

1 any briefings that if you just give us a minute, we'll come up
2 with some stuff. Because we have all this; it just hasn't been
3 prepared because we got caught flatfooted.

4 Are you aware of any type evidence, scientific or
5 otherwise, that's going to be available to you in a final
6 hearing on the merits?

7 MR. MCFADDEN: Well, your Honor --

8 THE COURT: And I don't care that you even produce it.
9 It's just right now I'm just curious if there is any, because I
10 don't think there is, but I don't know that.

11 MR. MCFADDEN: Your Honor, frankly, as of this moment,
12 I'm not currently aware of any other evidence. That's not to
13 say that it's not out there, but after doing research on the
14 issues, talking to various interested parties and those who may
15 have knowledge, as of this stage in the litigation as opposed to
16 later on farther down the line, I'm currently unaware of any
17 such evidence.

18 But if it please the Court, too, to address, like, some of
19 the issues or even the example --

20 THE COURT: And I'm not deciding on the merits today.
21 I'm just trying to decide who is likely to win down the road.

22 MR. MCFADDEN: Certainly, your Honor.

23 THE COURT: I want to make sure that I'm not making
24 you put up or shut up today. I'm just trying to get a notion of
25 whether or not what I believe is actually correct about what you

1 have so far.

2 MR. MCFADDEN: So at this point what you've seen is
3 currently what the State has to offer at this stage. But to
4 address, I guess, your hypothetical that even assuming for
5 argument purposes that the plaintiff has established standing
6 now, or even later, upon potentially supplementing this case
7 with some evidence, to even claim the chilling effect, though,
8 there must still be a, quote, unquote, specific present
9 objective harm or threat of specific future harm.

10 It has to be a credible threat, your Honor, and there's
11 been no attempt at prosecution here. There's been no government
12 action other than enacting the statute itself.

13 THE COURT: Has the Ethics Commission ever taken
14 action against a candidate?

15 MR. MCFADDEN: Your Honor, I think it's fair to assume
16 that, yes, the Ethics Commission has taken action against a
17 candidate.

18 THE COURT: Okay.

19 MR. MCFADDEN: Particular to this statute, I'm
20 currently not aware, especially the challenged portion of the
21 statute. But even going down that route with the Ethics
22 Commission, compared to any action or inaction against the
23 plaintiff, the State would still submit that that's still a
24 steep slope to climb because the Ethics Commission has no power
25 over the plaintiff whatsoever. They're a creature of statute.

1 They're limited --

2 THE COURT: You do -- I guess let me rephrase because
3 we've been kind of -- I don't want to call it a steep slope
4 deal, but the statute is what's being attacked, and I understand
5 that you say you have no power over the plaintiff, but you do
6 have power to enact the statute; correct?

7 MR. MCFADDEN: Yes, sir. The Arkansas General
8 Assembly has that authority.

9 THE COURT: Right. And I guess the argument was, we
10 don't have anything to do with that, but you do have or --
11 meaning you, I want to say the Ethics Commission does have
12 authority to require compliance or issue punishment for
13 violation of 7-6-203(e). Correct?

14 MR. MCFADDEN: Yes, sir. The Ethics Commission has
15 that authority over candidates, but not the plaintiff herself.

16 THE COURT: Right. And I guess what I'm saying is is
17 that the notion was is that we don't have -- we're only
18 empowered to levy fines against candidates, but what you're
19 empowered to do is levy fines against violators of 7-6-203(e).
20 So you can't make any argument that you don't have anything to
21 do with the statute; it's the statute that's been attacked. And
22 this has to do with your sovereign immunity argument, that we
23 can all agree as a matter of fact that the Ethics Commission is
24 in charge of enforcing this statute, and your distinction is is
25 this particular plaintiff isn't the proper person to bring it

1 because we can't enforce anything against her. And that would
2 go back to standing, but not sovereign immunity, because I want
3 to make it clear that there isn't any question the Ethics
4 Commission is enforcing or is the one in charge of enforcing
5 this particular statute. Is that fair enough?

6 MR. MCFADDEN: That's fair, your Honor, and just to
7 clarify, too, that sovereign immunity argument based on *Ex Parte*
8 *Young* was only applied or argued as for the Ethics Commission
9 against the plaintiff, as opposed to the Pulaski County
10 prosecutor or any other prosecutor out there.

11 THE COURT: I understood that, and I didn't mean to
12 say in that regard the State, or the big defendant, versus
13 separate defendants.

14 MR. MCFADDEN: And, your Honor, even just to elaborate
15 a little bit more, if anything else, for the record, for
16 purposes of the record, that even for the Ethics Commission to
17 so much as attempt to enforce a statute, so many hurdles have to
18 be cleared for them to even get to the point of enforcement.
19 You know, they are complaint driven. Someone has to make a
20 complaint within four years of the alleged violation. And this
21 is under Arkansas Code Annotated 7-6-218. It has to be -- the
22 allegation or the complaint has to be made within four years of
23 the violation. At that point they have a duty to investigate
24 because there's been an allegation of wrongdoing made against
25 them.

1 THE COURT: Slow down a little bit, Mr. McFadden. But
2 go ahead.

3 MR. MCFADDEN: Oh.

4 THE COURT: I was going to say, for the benefit of my
5 court reporter, slow down a little bit.

6 MR. MCFADDEN: I got a little excited there.

7 THE COURT: This election law will do it to you. So
8 go ahead.

9 MR. MCFADDEN: Every now and then.

10 If that complaint has been made within that relevant time
11 period, then they have a duty to investigate. There may or may
12 not be a hearing, but anyone accused of violating that is
13 entitled to a hearing. Then at that hearing, it's incumbent
14 upon the State, or the Ethics Commission, rather, to be more
15 particular about it, to determine or to prove that, yes, indeed,
16 this candidate has violated this portion of the statute.

17 So even if it is found to be true that they did, you know,
18 violate the statute, they're still provided with a number of
19 options. But first and foremost, they can just say, no, we're
20 not going to force this because we've found good cause to be
21 shown that it's not going to happen. And that's in Section 4 of
22 the statute. Alternatively, they can issue a letter of
23 reprimand, which ultimately could just be a slap on the wrist to
24 the candidate. They can tell the candidate, no, you need to
25 update -- you need to update various disclosure forms or, you

1 know, maybe we'll fine you, which would be limited to no less
2 than \$50 or no more than \$2,000. But then, alternatively, they
3 could report the finding to law enforcement, but then that's
4 going down the other barrel of worms to determine whether or not
5 any prosecutor even wants to exercise that prosecutorial
6 discretion in enforcing that statute.

7 So on behalf of the Ethics Commission, they would say that
8 even getting to that point, so many hurdles have to be crossed,
9 and then we're -- there's no allegation that they've gotten even
10 anywhere close to that. And so at least based on *Ex Parte*
11 *Young* --

12 THE COURT: Well, that would go back to the argument
13 that you're going to have to violate the law to put it in play,
14 and I've already ruled that the current case law doesn't require
15 you to break the law to challenge the constitutionality of one.
16 And so under your scenario, they would have to have broken the
17 law, gone through all the appeals, tried to justify things, in
18 order to get to the Ethics Commission, who I think we
19 acknowledge is empowered to punish violations of the statute.
20 And that may be another way of arguing that no one's gone to
21 arrest anybody yet, but I don't think the current law requires
22 that, and so --

23 MR. MCFADDEN: Anyway, your Honor, well, moving on,
24 other than standing, which is -- goes without saying based on
25 the pleadings, the argument here, that's the primary argument on

1 behalf of the State, and aside from sovereign immunity, then the
2 State would submit or request the Court to abstain from holding
3 this and allow the process to work through and meander their way
4 through the state court system.

5 THE COURT: So what's pending before a state court
6 that I would hold off and wait on?

7 MR. MCFADDEN: To my knowledge, there's nothing
8 pending in the state court system, at least in Pulaski County in
9 Arkansas, because that's where they would file it, where the
10 alleged cause of action has arisen.

11 THE COURT: Is there any lawsuit in state court
12 dealing with this statute currently pending before any Circuit
13 Court in Arkansas?

14 MR. MCFADDEN: Not to my knowledge, your Honor. If
15 there were any pending --

16 THE COURT: Would y'all have been notified had it
17 been?

18 MR. MCFADDEN: Hopefully. Sometimes we don't --

19 THE COURT: Fair enough. That's fair enough. That,
20 too, is required by statute, but you're -- your point is well
21 taken. We've had to circle back several times to pick up the
22 State back in the day, but, anyway --

23 MR. MCFADDEN: Sometimes they let us know when it's
24 too late and we have to come to the Court and ask for
25 forgiveness.

1 THE COURT: Okay. None that you've been made aware
2 of. We'll put it that way. Okay?

3 MR. MCFADDEN: That is correct, your Honor. But it's
4 worth pointing out, too, that federal courts have also
5 acknowledged that Arkansas state courts are perfectly capable of
6 handling a federal lawsuit and -- I'll rephrase that. They're
7 perfectly able to handle allegations of violations of federal
8 law or constitutional violations.

9 And inasmuch as, you know, getting past the State's
10 argument that the Court is inclined beyond standing, beyond
11 sovereign immunity, beyond our argument for abstention, but
12 getting to the brass tacks of the First Amendment issues, then
13 the State would still submit pursuant to *Buckley v. Valeo*,
14 there's -- I think all parties can agree that corruption is a
15 legitimate governmental interest and that the prevention of that
16 or the appearance of that is enough to satisfy at least the
17 first portion of that, but then --

18 THE COURT: I agree with that, that corruption is a
19 legitimate state interest.

20 MR. MCFADDEN: And inasmuch as getting to the second
21 part of that, for lack of a better term, whether it's fine-tuned
22 or narrowly tailored to address that, what we're talking about
23 is temporal or time restrictions. The State would still submit,
24 too, that in reference to the *O'Toole* case out of the Sixth
25 Circuit, although it did address judicial races, that

1 legislators and judicial officers, too, are all held to a very
2 high standard in that there is a general principle that -- at
3 least acknowledged by the Sixth Circuit, that the farther out a
4 campaign contribution is made, the greater the likelihood of
5 potential, real or not, bias or, for lack of a better term,
6 corruption. Which is not to say that that would be the case
7 there, but in reliance upon the *O'Toole* ruling, the State still
8 submits that argument.

9 THE COURT: How do you get past Waters's argument or
10 opinion about this is all contributions, great and small, that
11 opinion that it's just too broad because -- and I'm saying this
12 in jest because I've heard it in politics: You can rent me for
13 that, but you can't buy me for that. The notion that something
14 isn't big enough to really get my attention in a five or 25 or,
15 to use Mr. Pekron's number, \$27 contribution. Why do you
16 prohibit those for two years?

17 And I guess the problem I'm seeing with your side of the
18 argument is that these cases out there essentially say that you
19 can't limit the small contributions with the big, and this
20 statute has, even if it's to address corruption. It doesn't
21 appear to be narrowly tailored, either in time or in amount, to
22 take care of the bad actors. And I guess until somebody is
23 willing to get bought off for \$27, I guess they could be your
24 poster child that you could put up, but -- and I hope inflation
25 has gotten us past that. But how do you address that, that

1 hurdle that's in your way? And you may not be able to. That's
2 fair enough, too.

3 MR. MCFADDEN: For lack of better terms, your Honor,
4 it is what it is at this point. The statute, the State would
5 submit it speaks for itself that it's the intent of the
6 legislature, consistent with the will of the Arkansas
7 electorate, that they believe two years is sufficient to attempt
8 to prevent corruption.

9 But to, you know, address more particularly what makes the
10 difference between a campaign contribution from two years and
11 one day out compared to, say, one year and 364 days out -- just
12 by analogy, you hit me, what's the difference in the statute of
13 limitations? You know, just because something may have
14 happened, does it change, you know, from did an assault happen
15 or not, or is it right for a court to consider that if, you
16 know, they file the claim a year and a day late? Or, excuse me,
17 one day late compared to ensuring that they file it within one
18 day before the expiration of the statute of limitations?

19 I understand the implications of judicial economy and
20 whatnot, but, you know, many of the statutes of limitations are
21 also creatures of statute. And it's not always necessary for --
22 or the State submits, too, that it's not there -- it's not there
23 for the Court to, you know, question the wisdom or rightness of
24 the law.

25 THE COURT: And I'm with you there. I'm right there

1 with you on the wisdom and the rightness. I'm not big on
2 throwing my dad under the bus and having him eligible for
3 contributions either. I'm kidding about that because he's been
4 prohibited from making contributions for most of his adult life.
5 And I don't mean to make light of that, but I think you've
6 probably answered my question best you're going to be able to.

7 MR. MCFADDEN: At least at this stage, your Honor.
8 And I guess pending any further questions, we'll defer to
9 Mr. Pekron.

10 THE COURT: Mr. Pekron, any last brief words?

11 MR. PEKRON: Very brief, your Honor. Your Honor, I'll
12 just make a couple of very quick points.

13 First is, regarding the role of the Ethics Commission,
14 they're equally as responsible for creating the chill as the
15 prosecutor. And, in fact, if you go back to the *Butler* case, in
16 the Eighth Circuit, all the defendants -- the defendants in that
17 case were the Benton County prosecutor and all the members of
18 the Arkansas Ethics Commission, because they're the ones, all of
19 them can punish recipients of plaintiff's speech.

20 Very briefly regarding *O'Toole*, your Honor, *O'Toole* is a
21 case about judicial elections. As the Court is well aware,
22 judicial elections have a different set of rules. It's not
23 about corruption; it's about the integrity of the judiciary and
24 the idea we don't like judges running around collecting money
25 all the time because that makes judges look corrupt. That's a

1 different set of factors. The evidentiary burden is not the
2 same. And, in fact, *O'Toole* itself recognizes that because
3 we're talking about judicial elections, we know the integrity of
4 the judiciary is an accepted reason, and so we don't have to put
5 on evidence of that. *McCutcheon* has made clear that in campaign
6 contributions in political elections, nonjudicial elections,
7 that evidence is required.

8 Your Honor, the last thing I'd just like to do is
9 clarify -- I just want to make sure that I know what the Court
10 is expecting to see. I'm prepared to present an affidavit from
11 plaintiff saying, here are the candidates that I want to give
12 contributions to in the 2022 election. Is that what the Court
13 is expecting, or does the Court want something beyond that? Not
14 to put you on the spot, but if there's something your Honor --

15 THE COURT: I think that would be sufficient. What I
16 need is to satisfy myself that there's something more than a
17 notion of general contributions but that they -- that that
18 speech has some content to it.

19 MR. PEKRON: I understand.

20 THE COURT: As opposed to, I'm in favor of candidates.

21 MR. PEKRON: Yeah.

22 THE COURT: Something that would take it beyond the
23 realm of, I've just got a notion that I might want to get
24 involved in politics, because to me that's -- as I just
25 mentioned, that's speech without content, that -- anyway --

1 MR. PEKRON: I understand.

2 THE COURT: I think it would satisfy what I'm looking
3 for that I have specific people that I have in mind as opposed
4 to I just don't like this law.

5 MR. PEKRON: I understand.

6 THE COURT: I can't -- I don't want to pin you down
7 because it's not fair for me to tell you what the evidence needs
8 to be, but in this particular instance, I think you're asking me
9 what would satisfy me, and I believe that would.

10 MR. PEKRON: Okay. Thank you. As far as timing, I
11 think I can get you that within a few days, but I would just ask
12 until the end of next week, if necessary. But I'll try to get
13 it to you a lot sooner than that.

14 THE COURT: That's fine. The sooner you get it, the
15 sooner you'll get an answer from me.

16 MR. PEKRON: I understand.

17 THE COURT: And so --

18 MR. PEKRON: Our interests are aligned.

19 THE COURT: Yes. We'll just leave it at that.

20 MR. PEKRON: I understand. Thank you, your Honor. I
21 have nothing further, unless the Court has any other questions.

22 THE COURT: I don't at this time.

23 MR. PEKRON: Thank you.

24 THE COURT: I am going to state for the record that I
25 do not believe that the government's position regarding standing

1 dealing with whether or not Ms. Jones should have to actually
2 violate the law before she has standing to contest it is
3 supported by the case law, and so I'm ruling against the State
4 on that portion of the standing.

5 We've already discussed the earlier portion of the standing
6 that I'm taking under advisement.

7 I do not believe that the sovereign immunity argument is
8 sufficient to either dismiss the case or deny relief in this
9 case because I believe that they are empowered to levy fines
10 against violations of the statute, and it would be difficult to
11 conceive how it wasn't chilling for Ms. Jones to not be able to
12 make a contribution to an individual who wouldn't be found in
13 violation of the statute by receiving it.

14 I also don't see any legitimate reason under the law to
15 abstain or defer, as I have in my notes.

16 I do think that the prevention of corruption is a
17 legitimate state interest.

18 And I will deal with the remainder of what I've left
19 unresolved in a written order pending further submissions. And
20 if you don't mind sending what you're going to send to
21 Mr. McFadden and he can decide whether or not to respond, and I
22 don't need full-blown briefs. I just need what y'all want me to
23 hear, if you want to do it. It's up to you, but you can
24 certainly give me a page or two, but I'm not looking for any
25 re-briefing of the situation, really. Just another affidavit.

1 And if they, meaning the government, wants to argue that that's
2 somehow deficient, y'all can talk about how to get that before
3 me in the most efficient manner.

4 Anything else before we go off the record?

5 MR. PEKRON: No, your Honor.

6 MR. MCFADDEN: No, your Honor.

7 THE COURT: All right. Court is in recess.

8 (Proceedings adjourned at 2:34 p.m.)

9 REPORTER'S CERTIFICATE

10 I certify that the foregoing is a correct transcript from
the record of proceedings in the above-entitled matter.
11

12 /s/ Christa R. Jacimore, RDR, CRR, CRC
13 United States Court Reporter

Date: July 18, 2019

14

15

16

17

18

19

20

21

22

23

24

25